

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 1st day of September, two thousand and six.

PRESENT:

JON O. NEWMAN  
JOSÉ A. CABRANES  
ROSEMARY S. POOLER  
*Circuit Judges.*

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UNITED STATES OF AMERICA,

*Appellee,*

-v.-

No. 05-5160-cr

TIMOTHY FRENCHIE, also known as Timothy Neal, also known as Timothy Frenchy,

*Defendant-Appellant.*

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**APPEARING FOR APPELLANT:** YUANCHUNG LEE, Federal Defenders of New York, Inc., New York, NY, *for Defendant-Appellant*

**APPEARING FOR APPELLEE:** MARIA E. DOUVAS, Assistant United States Attorney (Michael J. Garcia, United States Attorney, Celeste L. Koeleveld, Assistant United States Attorney *on the brief*), United States Attorney's Office for the Southern District of New York, New York, NY, *for*

*Appellee*

Appeal from a judgment of the United States District Court for the Southern District of New York (P. Kevin Castel, *Judge*).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the case is **REMANDED** with directions to vacate the sentence and resentence.

Defendant-Appellant Timothy Frenchie appeals from a September 26, 2005 judgment entered by the District Court convicting Frenchie, pursuant to his plea of guilty, of two counts of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) and sentencing Frenchie principally to 33 months of imprisonment.

We assume the parties' familiarity with the underlying facts and procedural history.

The District Court found that the proper sentencing range pursuant to the United States Sentencing Guidelines ("U.S.S.G." or "Guidelines") spanned from 12 to 18 months of imprisonment.<sup>1</sup> At the sentencing hearing, the District Court then announced its intention to impose a non-Guidelines sentence as envisaged by *United States v. Booker*, 543 U.S. 220 (2005). Finding that Frenchie constituted a danger to the public, the District Court sentenced him principally to 33 months of imprisonment. The District Court had not notified Frenchie prior to the sentencing hearing that it was considering imposing a sentence above the applicable Guidelines range, nor had any submission of the prosecution explicitly requested a sentence above the Guidelines range.

Frenchie challenges his sentence on the ground that the District Court erred in not providing him with prior notice of its intention to impose a non-Guidelines sentence above the applicable Guidelines range. He relies primarily on Federal Rule of Criminal Procedure 32(h), which requires advance notice before a sentencing judge may impose an upward departure under the Guidelines, and Rule 32(i)(1)(C), which requires that a sentencing judge "allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence."

In a recent case in which a defendant challenged his sentence on grounds similar to those raised by Frenchie, we held that a sentencing judge must provide advance notice to a defendant before imposing a sentence above the Guidelines range, regardless of whether the sentence is a "non-Guidelines" sentence or a "Guidelines sentence" incorporating an upward departure. *See*

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<sup>1</sup> We intimate no view concerning the District Court's determination of the correct Guidelines range, which neither party challenges on appeal, and make no conclusions concerning the applicability of U.S.S.G. § 2K2.1 to Frenchie's New York State Youthful Offender Adjudication for robbery.

*United States v. Anati*, No. 05-3800, — F.3d —, 2006 WL 2075128 (2d Cir. July 20, 2006); *see also Burns v. United States*, 501 U.S. 129, 135 (1991). *Anati*, which was decided ten months after the District Court imposed Frenchie’s sentence, requires a remand in this case.

For the foregoing reasons, the case is **REMANDED** with directions to vacate the sentence and resentence in light of *Anati*.

FOR THE COURT,  
Roseann B. MacKechnie, Clerk of Court

By \_\_\_\_\_